

**Chapter 10.73
CRIMINAL APPEALS**

RCW 10.73.170 DNA testing requests.

(1) On or before December 31, 2004, a person in this state who has been convicted of a felony and is currently serving a term of imprisonment and who has been denied postconviction DNA testing may submit a request to the county prosecutor in the county where the conviction was obtained for postconviction DNA testing, if DNA evidence was not admitted because the court ruled DNA testing did not meet acceptable scientific standards or DNA testing technology was not sufficiently developed to test the DNA evidence in the case. On and after January 1, 2005, a person must raise the DNA issues at trial or on appeal.

(2) The prosecutor shall screen the request. The request shall be reviewed based upon the likelihood that the DNA evidence would demonstrate innocence on a more probable than not basis. Upon determining that testing should occur and the evidence still exists, the prosecutor shall request DNA testing by the Washington state patrol crime laboratory. Contact with victims shall be handled through victim/witness divisions.

(3) A person denied a request made pursuant to subsections (1) and (2) of this section has a right to appeal his or her request within thirty days of denial of the request by the prosecutor. The appeal shall be to the attorney general's office. If the attorney general's office determines that it is likely that the DNA testing would demonstrate innocence on a more probable than not basis, then the attorney general's office shall request DNA testing by the Washington state patrol crime laboratory.

(4) Notwithstanding any other provision of law, any biological material that has been secured in connection with a criminal case prior to July 22, 2001, may not be destroyed before January 1, 2005. [2001 c 301 § 1; 2000 c 92 § 1.]

Construction -- 2001 c 301: "Nothing in this act may be construed to create a new or additional cause of action in any court. Nothing in this act shall be construed to limit any rights offenders might otherwise have to court access under any other statutory or constitutional provision." [2001 c 301 § 2.]

Report on DNA testing -- 2000 c 92: "By December 1, 2001, the office of public defense shall prepare a report detailing the following: (1) The number of postconviction DNA test requests approved by the respective prosecutor; (2) the number of postconviction DNA test requests denied by the respective prosecutor and a summary of the basis for the denials; (3) the number of appeals for postconviction DNA testing approved by the attorney general's office; (4) the number of appeals for postconviction DNA testing denied by the attorney general's office and a summary of the basis for the denials; and (5) a summary of the results of the postconviction DNA tests conducted pursuant to RCW 10.73.170 (2) and (3). The report shall also provide an estimate of the number of persons convicted of crimes where DNA evidence was not admitted because the court ruled DNA testing did not meet acceptable scientific standards or where DNA testing technology was not sufficiently developed to test the DNA evidence in the case." [2000 c 92 § 2.]

Intent -- 2000 c 92: "Nothing in chapter 92, Laws of 2000 is intended to create a legal right or cause of action. Nothing in chapter 92, Laws of 2000 is intended to deny or alter any existing legal right or cause of action. Nothing in chapter 92, Laws of 2000 should be interpreted to deny postconviction DNA testing requests under existing law by convicted and incarcerated persons who were sentenced to confinement for a term less than life or the death penalty." [2000 c 92 § 4.]

Post-Conviction DNA Survey

1. Has your office received any requests for post-conviction DNA testing? **Yes** **No**
If so, please provide the following:

Name, address and phone number of attorney (or defendant if pro se) making the request:

Alleged basis for the request: _____

Response or current status of the request: _____

2. With respect to each case where either the State or Defense was prevented from presenting DNA test results at trial because of the Court's ruling that the **testing did not meet scientific standards**, please provide the cause numbers, case names and crimes charged.

3. With respect to each case where DNA testing of biological samples was not done or where relevant results were not produced because the **technology was insufficiently developed**, please provide the cause numbers, case names and crimes charged.

4. Have the advances in DNA technology permitted **reopening investigations** and/or charging of individuals based on the testing of previously acquired biological samples? If so, please provide the cause numbers, case names and crimes charged.

5. Have procedures been established in your county for the collection, preservation and retention of forensic biological evidence? **Yes** **No**. Identify the person(s) (name, address and phone number) responsible for supervising these procedures. _____

Signature _____ Name (Printed) _____ Date _____

County _____ Phone # _____ E-mail _____

Contact person: _____
Phone # _____ E-mail _____

Defense Post-Conviction DNA Survey

1. Has your office received any requests for post-conviction DNA testing?		Yes	No

If so, please provide the following:

Basis for the request: _____

The cause Numbers, case names and crimes of the underlying conviction:

Was a request made to the prosecuting attorney for testing:	Yes	No
1. Fingerprinting		
2. DNA testing		
3. Blood typing		
4. Other		

If not, why not, and if so, what was the result: _____

2. With respect to each case where either the State or Defense was prevented from presenting DNA test results at trial because of the Court's ruling that the **testing did not meet scientific standards**, please provide the cause numbers, case names and crimes charged.

3. With respect to each case where DNA testing of biological samples was not done or could not be done or where relevant results were not produced because the **technology was insufficiently developed**, please provide the cause numbers, case names and crimes charged.

4. Are you aware of cases where the state has **reopened investigations** and/or charged individuals based on the testing of previously acquired biological samples? If so, please provide the cause numbers, case names and crimes charged.

Signature	Name (Printed)	Date
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County	Phone #	E-mail
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Contact person: _____

Phone #	E-mail
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Washington State Office of Public Defense
Post-Conviction DNA Survey
DOC Contract Attorneys

Name: _____ Date: _____

Institution(s) served: _____

Number of inmates that have sought information/assistance regarding _____
any post-conviction DNA testing?

Number of inmates seeking assistance under RCW 10.73.170? _____

Expressed reasons for seeking information/assistance regarding post-conviction DNA testing?

What referrals have you made in these cases? _____

Number of years contracting with DOC to provide institutional legal services: _____

Approximate annual population of inmates of institutions served during each of those years:

Approximate percentage of those populations contacted for services in each of those years:

What steps (a) have been and (b) could be taken to effectively inform inmates of their rights to post-conviction DNA testing under RCW 10.73.170?

(a) _____

(b) _____

How many people do you estimate will seek post-conviction DNA testing under RCW 10.73.170 during the next four years?

Survey of Washington State Evidence Facilities

**By Anne E. Beardsley, Director
Innocence Project Northwest**

EXECUTIVE SUMMARY

The Act Relating to DNA Testing of Evidence, RCW 10.73.170, was implemented in Washington State in July 2000 and amended effective July 2001. One of the provisions of the Act requires that any biological material that has been secured in connection with a criminal case may not be destroyed before January 1, 2005. In Washington, the 39 counties' evidence rooms are responsible for the preservation of evidence.

Interviews of the county evidence room supervisors provide a basic portrait of evidence room procedures and the effect of RCW 10.73.170 on those procedures. Out of the 39 counties contacted for interviews, 34 counties participated.

The interviews revealed:

- In 91% of Washington counties participating, the individual prosecutor must give his or her authorization to destroy evidence from a case, including biological material.
- Among the 80% of the counties interviewed that developed procedures to comply with RCW 10.73.170, there was no consensus about the statutory requirements.
- In 91% of the counties, it is the responsibility of the officer on the scene of the crime to determine what evidence constitutes biological material.

In conclusion, the implementation of RCW 10.73.170 varies significantly across the state of Washington. Whether or not potential DNA evidence is preserved depends largely on which county collected the evidence.

INTRODUCTION

This report was prepared and is presented pursuant to a contract with the Washington State Office of Public Defense (OPD) in coordination with its study and report regarding the implementation of RCW 10.73.170, the Act Relating to DNA Testing of Evidence.

Washington State OPD contracted with the Innocence Project Northwest (IPNW) to conduct a telephone survey of each county's evidence facility. The survey inquired about the county's identification and preservation of potential biological samples and about the county's compliance with RCW 10.73.170.

METHOD

Innocence Project Northwest called each county's sheriff's office and asked to speak to the individual in charge of evidence. The background of the survey was explained and the evidence facility supervisors were advised that an understanding of each of the 39 counties' evidence storage procedures was necessary and requested the supervisor's assistance.

Each interview covered the following inquiries:

- Does evidence preservation depend on the classification of the crime?
- Does evidence preservation depend on whether there was an actual trial versus a guilty plea?
- As to the evidence that is already being preserved, who decides when the evidence will be destroyed?
- Was the provision in RCW 10.73.170, that any biological material that has been secured in connection with a criminal case may not be destroyed before January 1, 2005, known to the evidence room?
- Did the county develop procedures to follow this provision?
- Who determines if the evidence contains biological material?
- Will the implementation of this statute cause potential space concerns for the storage of evidence?
- Has there been any special training for the handling of biological evidence?

Over the course of two weeks, Innocence Project Northwest contacted all 39 counties' evidence rooms. Thirty-four of the 39 counties (87%) participated in the interviews.

FINDINGS

Does evidence preservation depend on the classification of the crime?

Sixty-five percent of the counties interviewed stated that their decisions affecting the preservation of evidence is not affected by the crime charged. In these counties, all evidence, regardless of the crime, is processed following the same procedures. For example, DNA evidence that is part of a homicide investigation is stored in the same manner as DNA evidence recovered in an assault investigation.

Eleven counties' storage of evidence is affected by the crime charged. In one of these counties, all evidence is held in cases of serious crimes because DNA may be present. Most of these counties maintain that the differences in evidence storage occurs between misdemeanors and felonies. Whether or not a suspect was charged in the case is also a distinguishing factor.

Washington State County Evidence Room Interview Responses

County	Storage affected by crime charged	Storage affected by plea of guilty or not guilty	Developed procedures to comply with statute	Storage concerns due to statute
ADAMS	No	No	Yes	Yes
ASOTIN	No	No	No	Yes
BENTON	No	No	Yes	-----
CHELAN	Yes	No	Yes	Yes
CLALLAM	No	No	Yes	No
CLARK	Yes	No	Yes	Yes
COLUMBIA	Yes	No	Yes	-----
COWLITZ	No	No	Yes	Yes
DOUGLAS	Yes	Yes	Yes	-----
FERRY	Yes	Yes	No	Yes
FRANKLIN	No	No	Yes	-----
GARFIELD	No	Yes	Yes	-----
GRANT	Yes	No	Yes	Yes
GRAYS HARBOR	No	No	No	No
ISLAND	-----	-----	Yes	-----
JEFFERSON	-----	-----	-----	-----
KING	No	No	Yes	-----
KITSAP	No	No	Yes	-----
KITTITAS	Yes	Yes	Yes	Yes
KLICKITAT	-----	-----	-----	-----
LEWIS	No	No	Yes	-----
LINCOLN	No	No	Yes	-----
MASON	Yes	No	Yes	Yes
OKANOGAN	Yes	Yes	No	No
PACIFIC	Yes	No	Yes	No
PEND OREILLE	No	No	Yes	-----
PIERCE	No	Yes	Yes	Yes
SAN JUAN	No	No	Yes	Yes
SKAGIT	No	No	No	Yes
SKAMANIA	-----	-----	-----	-----
SNOHOMISH	No	No	Yes	-----
SPOKANE	No	No	No	Yes
STEVENS	-----	-----	-----	-----
THURSTON	No	No	Yes	-----
WAHKIAKUM	-----	-----	-----	-----
WALLA WALLA	Yes	Yes	Yes	No
WHATCOM	No	No	Yes	-----
WHITMAN	No	No	No	Yes
YAKIMA	No	No	Yes	-----
Yes responses	11 (32%)	7 (21%)	27 (80%)	14 (41%)

Summary of Interview Responses by County Evidence Rooms in Washington

Response of 34 Counties that participated in interviews	Storage affected by crime charged	Storage affected by plea of guilty or not guilty	Prosecutor authorizes destruction of evidence	Developed procedures to comply with statute	Officer on crime scene determines if evidence is biological
Yes	11 (32%)	7 (21%)	31 (91%)	27 (80%)	31 (91%)
No	22 (65%)	26 (76%)	3 (9%)	7 (20%)	3 (9%)
No Comment	1 (3%)	1 (3%)	0	0	0

Does evidence preservation depend on whether there was an actual trial or if the defendant pleaded guilty?

Over three-fourths of the counties, 76%, responded that their preservation of evidence is not affected by whether or not there was a trial or a guilty plea in the case. In these counties, the evidence rooms maintain the same process for evidence gathered for a trial and evidence gathered in cases where the defendant admits his or her involvement in the charged crime.

However, seven counties reported that they treat evidence in cases that go to trial differently than the evidence in cases where the defendant pleads guilty. One county's evidence room tends to hold onto evidence longer from cases involving a trial because the chance for an appeal tends to be greater. Another county's evidence room supervisor explained that whether there was a trial or a plea affects the prosecutor's decision to authorize the destruction of evidence, but does not directly influence the work of the evidence room. Additionally, two other counties stated that the prosecutors authorize the destruction of evidence once the defendant pleads guilty.

As to the evidence that is already being preserved, who decides when the evidence will be destroyed?

In 91% of the counties, the evidence room must receive authorization from the prosecutor of a case before destroying or disposing of the case's evidence. In these counties, the general procedure consists of the prosecutor initiating contact with the evidence room. However, evidence room employees also may contact the prosecutor and ask for the prosecutor's authorization to dispose of the evidence. If there is no release from the prosecutor that authorizes the destruction of the evidence, the property room will save all of the evidence from the case.

In some counties, even though the prosecutor must authorize the destruction of evidence, the evidence room also has some discretion. In one county, once cases are complete, the prosecutors

automatically give permission for the evidence room to destroy the evidence from the case as soon as the 30 day appeal period is finished. Even with the implementation of RCW 10.73.170, this county's process remains the same and the prosecution still gives automatic permission for destruction. However, the evidence room must now determine if DNA evidence is present and retain that evidence until 2005. After January 1, 2005, the evidence room will be able to destroy all of the evidence, including the DNA samples, without conferring with the prosecutor because the evidence room already has the prosecutor's authorization. Similarly, another county stated that even if the prosecutor authorizes the destruction of the evidence, the property room must go through all of the evidence and retain the biological materials.

Only three counties do not require the prosecutor's authorization to destroy any evidence. One of these counties developed an inter-office agreement between the sheriff's office and the prosecutor's office in 1993. According to the agreement, the sheriff's office may destroy evidence from misdemeanors after two years and evidence from felonies after three years without obtaining the prosecutor's authorization or consent. The other two counties allow the sheriff to authorize the destruction of certain evidence.

Did the county develop procedures to follow this provision?

Twenty-five out of the 34 questioned counties have established procedures to comply with RCW 10.73.170. The procedures developed vary widely from county to county. One deputy stated that the main problem implementing this statute is the fact that any form of physical contact with an item potentially could lead to biological evidence. Accordingly, he believes that the statute must be more specific in its requirements. A supervisor in a large county's evidence room stated that this law as it is written makes her job extremely difficult. Her interpretation of the statute requires her to hold all of the evidence from cases that have biological materials as evidence until 2005, not merely the biological samples.

Similarly, a major metropolitan county expressed that although they are trying to reasonably honor the statute, they are unclear about the statute's interpretation and what evidence they must keep. This county feels that the law is problematic because the legislature did not define "biological material." Accordingly, the evidence room is unclear if the statute requires that they save plant evidence, envelopes and stamps that may have been licked, etc. In the meantime, the evidence room is retaining as much evidence as possible, including all of the evidence from the case, not just the materials identified as biological.

In contrast, another county's procedures mandate that the evidence room retain "all criminal evidence." Until directed otherwise, only the actual DNA samples are saved and, if authorized by the prosecutor, other evidence from the case is disposed of. He recognizes that this procedure will be problematic if the case needs to be retried.

Twenty-six percent of the evidence rooms report that they have no procedures set to ensure their compliance with RCW 10.73.170.

Who determines if the evidence contains biological material?

In 91% of the counties interviewed, the officer and/or detective on the crime scene determines what evidence contains biological material. One of these 31 counties explained that the evidence room has no voice in what is classified as biological material. By the time the evidence is given

to the evidence room, the officers have already packaged it and marked the potential DNA samples with bio-hazard stickers. However, in three other counties, the officer on the scene makes the initial determination if biological material is present, but the evidence room also plays a role. Blood and semen stains are usually obvious, but hair and urine samples may be easily overlooked. Accordingly, the person processing the evidence in the evidence room serves as a check and adds bio-hazard labels on evidence that originally was overlooked. The evidence room supervisor will then speak to the officer about his or her oversight.

Although reporting that the officer on the scene plays a pivotal role, a deputy who is in charge of a county evidence room believes that compliance with the statute will require the prosecutors to take on additional responsibilities. He maintains that prosecutors should go through all of their cases and earmark the cases where biological evidence played or could have played a part in the conviction. The prosecutors should then go through the evidence of each of these cases and tell the evidence room which items constitutes biological evidence and therefore must be kept.

Is it foreseeable that the implementation of this statute will cause space concerns for the storage of evidence?

Forty-one percent of the counties answering this question believed that the statute will deplete their storage and refrigeration resources. One of the deputies interviewed said that as a result of this statute, all of the state's evidence rooms are faced essentially with a crisis. He believes that the only way his county will be able to comply with the statute is if the Washington State Legislature provides additional funding to the counties for new storage and climate controlled areas.

Of the five evidence rooms reporting that the statute would not affect their storage capacity, two of the counties said that they will need to purchase additional freezers in response to the new statutory requirements.

Is there special training for the storage of biological evidence?

Only one of the 34 respondents mentioned an evidence class that discussed the storage of biological evidence. She reported that during the 8 hour conference, attendees asked numerous questions about RCW 10.73.170. Due to these questions, there was discussion about planning a week-long evidence class to address the complexities and requirements of the statute. The only advice presented at the conference about the statute's requirements was for the evidence rooms to talk to the individual prosecutors on each case and to try to preserve all evidence.

CONCLUSIONS

The implementation of RCW 10.73.170's biological evidence preservation requirement varies significantly across the state of Washington. While 24% of the counties interviewed were unaware of the statute, other counties restructured all of their evidence handling procedures in order to comply. Though three-quarters of the counties developed procedures to comply with RCW 10.73.170, they did not reach a consensus about the basic requirements of the statute. Accordingly, whether or not potential DNA evidence is preserved depends largely on which county collected the evidence.

The evidence officers in the 39 counties in the state of Washington have expressed a need for clarification of the requirements of RCW 10.73.170. A precise definition of “biological material” would facilitate coherent implementation the statute. The county evidence rooms seek guidance in their decision of whether to save all of the evidence in a case or just the potential biological material from a case until January 1, 2005. Further, distinctions between felony and misdemeanor criminal cases would benefit the counties, reducing the volume of material that must be preserved and the number of cases which require this detailed attention. Finally, an organized effort to educate evidence room staffs regarding this and similar initiatives would resolve many of the irregularities now observed.

Glossary of Terms

Legal Terms

ER 702 – Washington's rule of evidence governing the admissibility of expert testimony. The rule states: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."

Frye Standard –standard used by Washington courts to determine the admissibility of novel scientific evidence. See State v. Baity, 140 Wn.2d 1 (2000). The Washington Supreme Court, in State v. Cauthron, 120 Wn.2d 879 (1993), at 886-87 set out its interpretation of admissibility with respect to DNA evidence as follows:

In Washington, we have adopted the standard for determining if evidence based on novel scientific procedures is admissible set forth in Frye v. United States, 293 F. 1013, 1014, 34 A.L.R. 145 (D.C. Cir. 1923). The rule is settled:

[E]vidence deriving from a scientific theory or principle is admissible only if that theory or principle has achieved general acceptance in the relevant scientific community. State Martin, 101 Wn.2d 713, 684 P.2d 651 (1984).

The Washington Supreme Court went on to note, at 887, that:

Under Frye, a court is to determine if the evidence in question has a valid, scientific basis. Because judges do not have the expertise required to decide whether a challenged scientific theory is correct, we defer this judgment to scientists. This inquiry turns on the level of recognition accorded to the scientific principle involved - we look for *general acceptance* in the appropriate scientific community. See Jones v. United States, 548 A.2d 35, 42 (D.C. 1988). If there is a significant dispute between qualified experts as to the validity of scientific evidence, it may not be admitted."

Scientific Terms

DNA - deoxyribonucleic acid – Considered the "blueprint of life", it is the genetic material in cells. It can be pictured as a long, double-stranded string, with millions of links or bases between the strands, like the steps of a ladder. Inside the cell these strands are twisted into a spiral or double helix. One strand of the ladder is inherited from each parent and passed on to each offspring.

Locus (plural = loci) – locations, refers to specific, identified locations on chromosomes.

Mitochondrial DNA (MtDNA) – DNA found in the mitochondria, inherited solely from the mother. Because there are hundreds of thousands of mtDNA molecules per cell, even degraded bones, teeth, or similar samples may be tested.

Forensic Technologies

Polymorphism -- The variety of identifiable patterns known to occur at specific sites in DNA. These sites are studied, the frequencies of each pattern are measured, and the likelihood that

two samples were from the same source is calculated. These patterns are the basis of human DNA identification technology.

Restriction Fragment Length Polymorphism (RFLP) Technology - the analysis of the lengths of DNA fragments when chromosomes are cut at specific sites by restriction enzymes. After sample DNA is cut (digested) with one or more restriction enzymes, the resulting fragments are sorted according to molecular size. The size differences are analyzed to determine the sample's DNA profile.

Polymerase Chain Reaction (PCR) Technology – A technique used to copy DNA in the laboratory. PCR development gives scientists the ability to test small samples of blood or other biological fluids - as few as 50 -100 cells. DNA in a sample is transformed after chemicals are inserted that cause individual DNA stands to replicate, producing a larger number of measurable cells. This allows faster and more precise analysis of samples that contain only small quantities of DNA.

DQ alpha testing –Human Leukocyte Antigen (HLA) Blood testing before method used before DNA testing was widely available. The DQA1 or DQ-alpha gene, which is polymorphic, was measured. Early PCR DNA identification techniques utilized this technique.

D1S80 - A specific DNA site that was used for early PCR commercial testing kits. Its focus is an area on chromosome 1 that contains a 16 base sequence that repeats itself different numbers of times; the different numbers of repetitions are matched between samples.

Short Tandem Repeats (STRs) – A PCR-based technology focusing on differences between individuals based on the number of repeating small bases of DNA at specific loci. Under the STR-based guidelines adopted by the FBI for the CODIS system, the national standard for DNA identification, 13 specific areas are examined.

Single Nucleotide Polymorphisms (SNPs) - Specific sites in DNA where single bases may differ in the population. Human genome research has found that there are several million of these differences between any two individuals. SNP technology has the potential to map an individual's DNA uniquely, without the need for a population base.

CODIS – Combined DNA Index System – The FBI's computerized system for communicating, collecting and comparing STR profiles. Authorized by Congress in 1994, the system set PCR based STR analysis at 13 specific loci. CODIS is based on the entry of DNA profiles into offender or forensic (crime scene) databases by crime labs in the various states. This information is then compared with offender or forensic profiles to link crimes and to connect crimes to offenders.

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